

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 33381

APPLICATION OF THE NATIONAL RAILROAD PASSENGER CORP. UNDER  
49 U.S.C. 24308(a)--SPRINGFIELD TERMINAL RAILWAY COMPANY, BOSTON AND  
MAINE CORPORATION, AND PORTLAND TERMINAL COMPANY

Decided: June 25, 1997

This proceeding was initiated upon application by the National Railroad Passenger Corporation (Amtrak) pursuant to a 1991 Congressional directive that Amtrak operate passenger service between Boston, MA, and Portland, ME, including operations over the lines of Springfield Terminal Railway Company, Boston and Maine Corporation, and Portland Terminal Company, railroads under common control of Guilford Rail System.<sup>1</sup> By decision served May 6, 1997, we established an evidentiary schedule for a proceeding under 49 U.S.C. 24308(a) to determine reasonable terms and compensation for Amtrak's use of B&M's rail line between the Massachusetts/New Hampshire State line and Portland, ME.<sup>2</sup> In that decision, and in a decision served May 14, 1997, we denied several of B&M's discovery-related requests, including B&M's requests that we issue *subpoenas duces tecum* to compel employees of the General Accounting Office (GAO), the Office of Management and Budget (OMB), the State of Maine, and the U. S. Department of Transportation (DOT) to respond to its discovery requests.

This decision addresses B&M's further motions regarding discovery; B&M's motion to dismiss this proceeding; and Amtrak's motion to modify the procedural schedule to permit it to file a rebuttal evidentiary statement. A separate decision by the Board's Secretary will address a motion for a protective order, filed June 6, 1997, by the Northern New England Passenger Rail Authority (NNEPRA).<sup>3</sup>

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<sup>1</sup> Respondent railroads will be collectively referred to as B&M.

<sup>2</sup> This 78-mile line is known as the Plaistow-Portland line.

<sup>3</sup> NNEPRA was created by the State of Maine in June 1995 as the successor in interest to the Maine Department of Transportation (MDOT) to implement Amtrak's extension of passenger service between Boston and Portland. NNEPRA will bear the cost of the service extension, and we have granted its request to intervene as a party in this proceeding.

A. **B&M's Motions Regarding Discovery.** By motion filed May 22, 1997, B&M asks us to reconsider our decisions denying its requests to serve subpoenas on officials of DOT, OMB, the GAO, and the State of Maine; by motions filed May 29, May 30, and June 20, 1997, B&M asks us to order Amtrak and NNEPRA to respond to particular discovery requests made by B&M.<sup>4</sup> We will deny B&M's motions.

1. **The Request for Subpoenas.** In our earlier decisions, we denied B&M's requests for subpoenas relating to Amtrak's financial condition, finding the information not relevant to the proceeding before us. B&M maintains that our issuance of subpoenas is a purely ministerial act; accordingly, B&M states, we should have routinely issued the sought subpoenas, without even considering whether the information sought would be relevant to the proceeding.

We disagree. Our discovery rules, which were recently revised in *Expedited Procedures for Processing Rail Rate Reasonableness, Exemption and Revocation Proceedings*, STB Ex Parte No. 527 (STB served Oct. 1, 1996, 61 FR 52710-715), contemplate that private parties will initiate discovery privately, without our involvement. Although our regulations do provide for the possible issuance of subpoenas in oral hearing cases (subject to a showing of relevancy, *see* 49 CFR 1113.2), they generally do not provide for any early Board presence (ministerial or otherwise) in the discovery process. And when the parties reach an impasse in discovery, and seek our intervention, we will indeed consider questions such as the relevance of the sought materials, in determining whether to compel the production of information.

Here, we have already found that Amtrak's financial condition is not relevant to the determination that we are required to make in this proceeding. Therefore, B&M's request for

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<sup>4</sup> By motion filed June 10, 1997, B&M asks for leave to file a reply in support of its motions to compel discovery from Amtrak and NNEPRA. Because B&M has failed to justify its request to file a reply not permitted by our rules [49 CFR 1104.13(c)], its motion for leave to file will be denied. We note that, even though we do not consider its reply, B&M's seemingly interminable pleadings have made its position in this proceeding quite clear.

reconsideration of our orders rejecting its efforts to secure opinions of Government officials about Amtrak's financial condition will be denied.<sup>5</sup>

2. **The Motions to Compel.** B&M has sought discovery of particular information from Amtrak and NNEPRA. In response, Amtrak and NNEPRA have provided extensive materials. NNEPRA indicates that it has given B&M over 18,500 pages of documents relating to passenger rail operations, incremental costs of track maintenance, Amtrak's financial condition, and cost of liability insurance. Amtrak states that it has produced voluminous data in response to B&M targeted document requests, and that five Amtrak officials have already been deposed by B&M; Amtrak's tendered information includes audited annual financial statements, Amtrak's strategic and business plan, recent legislative requests to Congress, Congressional testimony by Amtrak's chairman and its chief operating officer, and publicly available OMB and GAO documents. *See* Exhibits A and B to Amtrak's reply, filed May 27, 1997.

B&M appears to seek additional materials concerning three issues: (1) communications between Amtrak and NNEPRA and the Massachusetts Bay Transit Authority (MBTA) bearing upon issues such as the cost of the services to be provided and the relationships between Amtrak and the other entities; (2) Amtrak's financial condition; and (3) the cost of maintaining the line. However, the parties have already produced voluminous information concerning maintenance costs, and B&M has not provided any basis for concluding that Amtrak or B&M's other discovery targets have withheld anything further that is likely to be admissible or to lead to the discovery of admissible evidence in this regard. Moreover, although Amtrak has already produced extensive information on its financial condition, as we have held before, our proceeding does not revolve around Amtrak's alleged impending demise. Finally, B&M's principal argument as to the Amtrak/NNEPRA/MBTA communications issue is that it should have been provided a "privilege log" detailing the precise basis of any claim that any communications are privileged; B&M,

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<sup>5</sup> B&M's suggestion that the government agencies from which it sought information would have complied, had we issued subpoenas, is without basis. *See* May 2, 1997 letter to B&M, by Paul Samuel Smith, DOT Senior Trial Attorney ("the Department would oppose such a subpoena by all available means"); April 24, 1997 response to B&M by U.S. Department of Justice trial attorney, Kathryn D. Ray, on behalf of OMB.

however, has not come forward with even a minimal showing that its burdensome and broadly worded discovery request is reasonably calculated to lead to the discovery of any admissible information. For these reasons, and given the substantial materials already turned over to B&M, B&M's motion to compel will be denied. We have never permitted open-ended discovery into a party's business when that discovery is unlikely to produce evidence that will affect our decision, nor are we required to do so. *See Trailways Lines, Inc. v. ICC*, 766 F.2d 1537, 1546 (D.C. Cir. 1985).

**B. B&M's Motion to Dismiss.** By motion filed May 28, 1997, B&M asks us to dismiss the entire proceeding. Notwithstanding its assertion that it has not been given enough information in discovery, B&M submits substantial financial materials and calculations that, it states, demonstrate that Amtrak is insolvent and on the verge of bankruptcy. B&M urges us, in view of what it considers Amtrak's perilous financial condition, to forgo a contentious compensation proceeding and immediately dismiss the application.

The request for dismissal will be denied. In 49 U.S.C. 24308(a), Congress has directed the Board, upon application of Amtrak, to require that certain railroad facilities and services be made available to Amtrak, and to prescribe reasonable terms and conditions for their use. Apart from this general statutory directive, here, Congress has specifically directed Amtrak to provide the service in question. B&M, if its motion were granted, would frustrate the Congressional intent. Dismissal of this case, on the ground that Amtrak's viability is suspect, would plainly undermine Congress's directive that Amtrak operate this service, and would exceed our role, which is simply to determine the compensation to be paid by Amtrak for the use of B&M's facilities. Amtrak's future has been uncertain since its creation in 1971, and yet, in no case arising under section 24308(a) has the potential of Amtrak's demise played a role in the setting of compensation. We will set compensation here, as we are required to do and as has been done in the past. We will not, however, put a cloud over this and every other Amtrak operating agreement by speculating as to whether Amtrak is now or likely will in the future be on the verge of bankruptcy.

**C. Amtrak's Proposed Schedule Change.** The evidentiary schedule in this proceeding calls for the submission of B&M's evidence on June 27, 1997, and the filing of simultaneous opening and reply briefs due July 25 and August 16, 1997, respectively. In its request filed May 7, 1997, Amtrak seeks permission to file a rebuttal on July 25, 1997, with opening and reply briefs then due August 15 and September 5, 1997, respectively. Amtrak contends that, because it does not currently know what terms or compensation B&M will propose for Amtrak's operation over the Plaistow-Portland line or what evidence B&M will adduce to support its position, it is critical that Amtrak be given the opportunity to rebut B&M's initial evidentiary statement. Amtrak argues that it is entitled, as a matter of due process, to respond to B&M's evidence, and that it would be an abuse of our discretion if we denied Amtrak this opportunity.

In opposing the requested schedule change, B&M asserts that Amtrak will not be harmed by having no opportunity to rebut, because Amtrak has long known the terms and compensation B&M proposes for the Plaistow-Portland rail passenger operation. B&M indicates that its terms and conditions are, and will continue to be, those terms and conditions B&M claims Amtrak agreed to in July 1995, in addition to the two indemnity proposals B&M advanced in its motion for summary judgment, filed in this proceeding on March 26, 1997. B&M contends that we properly exercised our broad discretion in establishing a schedule that does not provide for rebuttal testimony. Finally, B&M asserts that, if we grant Amtrak the right to file a rebuttal, we must afford B&M the right to file sur-rebuttal testimony 30 days later.

Because Amtrak has failed to show sufficient grounds for revising the schedule at this time, we will deny its request. B&M indicates that the issues in this proceeding are well defined and already known by the parties. In this circumstance, we see no reason to prolong the evidentiary stage of the proceeding by allowing a further round of filings. However, should any party introduce significantly new or different issues into the case, we will entertain requests at that time to permit responses to such issues or evidence.

**D. B&M's Motion to Extend Its Due Date.** Finally, we note that B&M has sought an extension of the date on which its opening statement is due, until 14 days after B&M obtains all of

the discovery to which it claims it is entitled. We are not, however, granting further discovery. Moreover, Amtrak's argument in its response filed June 24, 1997, that B&M's discovery has been conducted in a manner designed to delay this proceeding is not implausible. We will not unnecessarily delay this case. B&M's evidence will be due [10 days after service of this order].

*It is ordered:*

1. The following B&M motions are denied: (a) motion filed May 22, 1997 for reconsideration of our decisions served May 6 and May 14, 1997; (b) motion filed May 28, 1997 to dismiss the entire proceeding; (c) motion filed May 29, 1997 to compel discovery from Amtrak; (d) motion filed May 30, 1997 to compel discovery from NNEPRA; (e) motion filed June 10, 1997 for leave to file a reply in support of motion to compel; and (f) motion filed June 20, 1997, to compel Amtrak and NNEPRA deposition testimony.

2. Amtrak's request to modify the procedural schedule is denied.

3. B&M's evidence is now due on [10 days after service of this decision]; opening briefs are due [38 days after service of this decision]; and reply briefs are due [59 days after service of this decision].

4. This decision is effective on its date of service.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams

Secretary